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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 571

ALFRED MARCHEV and ANN MARCHEV,
Appellants,

vs.

TOWNSHIP OF LIVINGSTON,
Appellee.

On Appeal from the Supreme Court of the State of New Jersey

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of the State of New Jersey

Jurisdictional Statement

Appellants appeal from the final order of the Supreme Court of the State of New Jersey, entered on February 23, 1965, denying a Petition of Certification to the Appellate Division of the Superior Court of New Jersey to review the judgment of the said Appellate Division entered on Novem-

ber 30, 1964, affirming a judgment of the Essex County Court entered on March 5, 1964, which in turn affirmed the conviction of Appellants in the Municipal Court of the Township of Livingston, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The Supreme Court of New Jersey did not write an opinion. Its order denying appellants' petition for certification printed in Appendix A hereto, *infra*, p. 1a is reported at 44 N. J. 412, 209 A. 2d 145. The Opinion of the Appellate Division of the Superior Court of New Jersey, printed in Appendix B, hereto, *infra*, p. 2a, is reported at 85 N. J. Super. 428, 205 A. 2d 65. The oral opinion of the Essex County Court, printed in Appendix C, hereto, *infra*, p. 10a, is not reported. The opinion of the Municipal Court of the Township of Livingston, printed in Appendix D, hereto, *infra*, p. 17a, is not reported.

Jurisdiction

Appellants were convicted in the Municipal Court of the Township of Livingston on January 8, 1964. The Essex County Court affirmed the convictions on March 5, 1964, and its judgment was affirmed by the Appellate Division of the Superior Court of New Jersey on November 30, 1964. The Supreme Court of New Jersey entered its order denying a Petition of Certification to the Appellate Division of the Superior Court on February 23, 1965. A notice of appeal was filed in the Supreme Court of New Jersey on May 20, 1965. On July 17, 1965, The Honorable John J.

Francis, Justice of the Supreme Court of New Jersey, granted appellants' application for an extension of time to file the record, docket the appeal, and file a jurisdictional statement, to September 15, 1965. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, §1257(2), since the validity of State statutes was drawn into question on the ground that they are repugnant to the Constitution of the United States and they were held to be valid. The statutes in question are municipal ordinances. The following cases sustain the jurisdiction of the Supreme Court to review this judgment on appeal: *King Mfg. Co.* v. *Augusta*, 277 U. S. 100; *Jamison* v. *Texas*, 318 U. S. 413.

Questions Presented

1. Whether Sections 901 and 1201 of the Revised Zoning Ordinance of the Township of Livingston, relating to use and occupancy of premises, in a "R-4" Residence District, and construed by the Supreme Court of New Jersey to prohibit appellants from parking their camp trailer out of doors on their premises, are unconstitutional in that they violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

2. Whether Ordinance 46 of the Township of Livingston, in prohibiting the parking of any trailer within the limits of the Township, except for indoor parking for repairs or storage, is unconstitutional in that it violates the due process, privileges and immunities and equal protection clauses of the United States Constitution, and constitutes an unreasonable burden upon interstate commerce.

Statutes Involved

Sections 901 and 1201 of the Revised Zoning Ordinance of the Township of Livingston and Ordinance No. 46 of the Township of Livingston, are set forth in Appendices E and F hereto, *infra*, pp. 26a to 27a.

Statement

Appellants Alfred Marchev and Ann Marchev, his wife, resided at 96 Belmont Drive, in the Township of Livingston, Essex County, New Jersey, on premises owned by them. These premises were zoned for one family, residential use. The Marchevs owned a small trailer, which they and their children used on camping trips in New Jersey and neighboring states. When not so used, the Marchevs parked their trailer on their own property.

In September, 1963, the Building Inspector of the Township of Livingston filed a complaint in the Municipal Court of the Township charging appellants with placing, storing and parking a trailer on their property in violation of Sections 901 and 1201 of the Revised Zoning Ordinance, relating to use and occupancy of premises located in an "R-4" residence district. At the same time, the Township Manager also filed a complaint charging appellants with the same acts in violation of Ordinance No. 46 of the Township of Livingston, which prohibits the parking of trailers out of doors within the municipality.

How the Federal Question is Presented

(a) Municipal Court

Ordinance No. 46 was attacked as unconstitutional in the Municipal Court, on the ground that it was not reasonably

related to health, welfare and safety, and hence was an improper exercise of police power, by way of motions to dismiss the complaints (18a; 32a-34a);* and an objection (25a-26a). The Magistrate, in his opinion held that Ordinance 46 was not an unreasonable, arbitrary or inappropriate use of police power (8a-9a, Appendix D, *infra*. pp. 17a-18a).

Sections 901 and 1201 of the Revised Zoning Ordinance were attacked as unconstitutional in the Municipal Court in that they violated due process in that they were too vague and indefinite, by way of objection (27a); and motions to dismiss complaints (32a, 57a-60a). The magistrate in his opinion held by implication that the zoning ordinance was not too vague and indefinite, in his holding that parking a camp trailer impaired the residential character of the neighborhood, which conclusion was "fortified by the Court's authority to employ common sense and Judicial and personal knowledge in determining the customary and ordinary accessory uses intended under the given circumstances." (15a, Appendix D, *infra,* p. 24a).

(b) County Court

Since the trial *de novo* in the Essex County Court was heard on the Municipal Court record, the same objections raised in the Municipal Court were before the County Court. In addition, Ordinance No. 46 was attacked as unconstitutional in that was an improper exercise of police power, discriminatory and violative of equal protection of

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* "a" refers to pages of Appendix to Appellants' brief in the Superior Court of New Jersey, filed as part of the record in this court, unless otherwise noted.

the laws, all by way of argument on a motion to dismiss (61a-66a; 72a). The County Court, in its oral opinion held Ordinance 46 to be a valid exercise of police power and not discriminatory (83a, 85a, Appendix C, *infra*, pp. 13a; 16a).

Sections 901 and 1201 of the Revised Zoning Ordinance were attacked as unconstitutional in that the definition of accessory use was too vague and indefinite and the sections violated the due process and equal protection clauses of the Constitution (68a-69a, 72a). The County Court held by implication that the zoning sections were constitutional in holding that parking a trailer was not an accessory use 81a-82a, Appendix C, *infra*, pp. 11a-12a).

(c) Appellate Division of the Superior Court

The validity of Ordinance No. 46 was drawn into question in appellants' brief to the Appellate Division of the Superior Court by way of argument that the ordinance was not a proper exercise of police power since it was not concerned with health, safety or welfare (Br. 3-4)*, and that the ordinance was vague, arbitrary, capricious and unreasonable, in violation of the 14th Amendment (Br. 7-10). The court held that police power includes the right to enact regulatory ordinances for the protection and preservation of property values affecting the general welfare of the community; that an objectionable use which may be prohibited by a zoning statute may also be barred under general police power (4a-5a, Appendix B, *infra*, p. 6a); and

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* "Br." refers to Appellants' brief to the Appellate Division of the Superior Court of New Jersey, filed as part of the record in this Court.

that Ordinance No. 46 was a valid exercise of police power and not unconstitutional (5a, Appendix B, *infra*, p. 7a).

(d) Supreme Court of New Jersey

The constitutionality of Ordinance No. 46 was drawn into question in the Supreme Court of New Jersey by way of argument that it was unreasonable and violative of the equal protection and due process clauses of the 14th Amendment (Appellants' Petition to Supreme Court, pp. 8-10, filed as part of the record in this Court).

The Supreme Court denied appellants' Petition for Certification without opinion (Appendix A, *infra*, p. 1a).

The Questions Are Substantial

The questions are substantial because they involve convictions under municipal ordinances which in practical effect exclude recreational camp trailers from the Township of Livingston. These adjuncts to outdoor family recreation are discriminated against by an ordinance prohibiting the parking of a trailer within the Township limits except for storage or repairs, both of which must be within a building, and by a zoning ordinance which has been construed to include recreation as an accessory use to residential property, *Borough of Chatham* v. *Donaldson*, 69 N. J. Super. 277, 174 A. 2d 214, but which in this case has been held to prohibit the parking of such trailers on residential property on the theory that the parking of such trailers does not constitute an accessory residential use.

The importance of the questions herein lies not only in the fact that because of the increasing popularity of outdoor camping as family recreation, similar ordinances

throughout the nation affect a greater number of citizens every day, but also because the ordinances in question impose criminal penalties without meeting the minimal requirements of due process, and in addition violate other clauses of the Constitution.

(a) Sections 901 and 1201 of the Revised Zoning Ordinance, construed to prohibit the parking of a camp trailer on the residential property of its owner, violate the due process clause of the Fourteenth Amendment in three respects: first, the ordinance arbitrarily and capriciously discriminates against those who engage in outdoor family recreation; second, it deprives appellants of the use of their property without due process of law; third, the lack of clear definition in the ordinance of what constitutes an accessory use to residential property results in a statute which is so vague and indefinite that it fails to apprise an individual of those acts which may subject him to criminal penalties, *United States* v. *Harriss,* 347 U. S. 612, 617; *Bouie* v. *City of Columbia,* 378 U. S. 347, 351. Although "accessory" has been construed to mean "recreational" use, *Borough of Chatham* v. *Donaldson, supra,* the individual who engages in outdoor camping as recreation has no means of knowing that he may not keep necessary equipment for such recreation on his own property. This despite the fact that he may keep equipment incidental to other recreation, such as a ham radio tower on his premises. *Skinner* v. *Zoning Bd. Adjust., Cherry Hill Tp.,* 80 N. J. Super. 380, 193 A. 2d 861.

Sections 901 and 1201 also violate the equal protection clause of the Constitution in that they discriminate against the recreational use put to their property by appellants,

as opposed to those uses permitted other "R-4" residential district property owners who indulge in different forms of recreation. See *Truax* v. *Corrigan,* 257 U. S. 312, 333.

(b) Ordinance No. 46, prohibiting the parking of a trailer within the limits of the Township of Livingston, except for purposes of repair or storage, both of which must be in a building, also violates the due process clause in that is arbitrary, capricious and unreasonable. Moreover it constitutes a burden on interstate commerce, violates the equal protection of the laws clause, the privileges and immunities clause, and is an improper exercise of police power.

By the very terms of the statute, anyone with a trailer attached to his car, or indeed, one driving a car with sleeping facilities may not park anywhere on the public streets of the Township of Livingston, for even so short a time as it takes to make a telephone call. And if he should be travelling, for example, from Pennsylvania to New York and be unfortunate enough to have a flat tire in Livingston, he may not even change that tire unless he can find a building in which to do so and some means of transporting his car to that building. Clearly this is an arbitrary and capricious interference with the right of an individual to travel on the public highways from state to state, *Kent* v. *Dullus,* 357 U. S. 116, 125-127; *Edwards* v. *California,* 314 U. S. 160, 178, and deprives him of the equal protection of the laws extended to those who may engage in a different form of recreation.

Most serious, however, is the improper exercise of police power by the Municipality. The ordinance in question is an exercise of police power. Such an ordinance must have a

reasonable relationship to the health, safety and welfare of the community. See *Lochner* v. *New York,* 198 U. S. 45.

There is no apparent or substantial relationship between the public health, welfare and safety and an ordinance prohibiting the parking of a small recreational camp trailer. The ordinance is beyond the scope of the constitutional limitations on the exercise of the police power.

CONCLUSION

This case raises substantial issues of public importance which warrant resolution by this Court. It is respectfully submitted that jurisdiction should be noted and the judgments below reversed.

Respectfully submitted,

JAMES T. DOWD,
Counsel for Appellants.

APPENDIX A

Order Denying Petition

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 23rd day of February, 1965.

JOHN H. GILDEA,
Clerk.
Clerk of the Supreme Court.

FILED:

Feb. 23, 1965
JOHN H. GILDEA,
Clerk

APPENDIX B

Opinion of Appellate Division

Argued November 9, 1964—Decided: November 30, 1964.

Before Judges CONFORD, KILKENNY and LEWIS.

Mr. JAMES T. DOWD argued the cause for appellants (Messrs. DOWD AND DOWD, attorneys).

Mr. RALPH A. YACAVINO argued the cause for respondent.

The opinion of the court was delivered by LEWIS, J.A.D.

Defendants Alfred Marchev and Ann Marchev husband and wife, were convicted in the Municipal Court of the Township of Livingston on two charges: on complaint of the township manager for violation of Ordinance No. 46 prohibiting, subject to stated exceptions, the parking of trailers within the municipality; and on complaint of the zoning officer for violation of the local zoning ordinance. They were consolidated for trial.

On appeal to the County Court, and after a trial *de novo* on the stenographic record, the convictions were affirmed. A reversal of the trial court's determinations is urged before us for three reasons: (1) the prohibitory ordinance is invalid as it is arbitrary, capricious and unreasonable, and it exceeds the general regulatory powers of the municipality; (2) the parking of a trailer adjacent to a one-family residential dwelling is a permitted accessory use under the local zoning ordinance; and (3) the prosecution failed to prove beyond a reasonable doubt each of the elements of the offenses charged. At oral argument this third point was abandoned.

Appendix B

Succinctly stated, the facts are: Defendants reside in a one-family dwelling at 96 Belmont Drive in an "R-4" Residence District of the Township of Livingston. In October 1962 they purchased a camp trailer, described by the zoning officer as "a small house trailer." It is a mobile unit, but not self-propelled, with a trailer hitch for attachment to an automobile. The facility is approximately seven feet long, six feet wide and six feet high; it is self-containing for camping, with sleeping accommodations, a sink and cooking equipment.

The Marchevs' use of their trailer was principally for camping over weekends, and it was only utilized for living purposes when they were away from home on recreational trips. When at home the trailer was generally parked or stored near their house on Belmont Drive. The building inspector testified, "It was parked alongside of the house. * * * Well, roughly it was back about three or four feet from the front of the house on the side of the house. * * * It has been there for quite some time." The defendants had been notified by the zoning officer, in person and by letter, to remove their parked vehicle.

As to Ordinance No. 46. It is entitled "An Ordinance defining trailers or camp cars and prohibiting the parking or placing of the same within the limits of the Township of Livingston." The proscriptive language is coupled with an exception. We quote:

> "It shall be unlawful for any person to park any trailer or camp car on any street in the Township of Livingston or on any premises within the limits of the Township except for the purpose of repair or storage. Any such trailer or camp car undergoing repairs or being stored shall be kept within a build-

ing and shall not during such period of repairs or storage be used by person as a dwelling or sleeping place." (Section 2)

That the camping unit in question is a "trailer" within the definition of that word set forth in said ordinance is not controverted. The complaint against the Marchevs was predicated upon a violation of the ordinance in that their camp trailer was stored on their premises in the Township but not "within a building."

While defendants concede that municipalities may by ordinances regulate trailer camps, camp sites and trailer residences, they cite *Morris* v. *Elk Tp.*, 40 N. J. Super. 34 (Law Div. 1956), and *Devine* v. *Mantua Tp.*, 28 N. J. Super 299 (Law Div. 1953), for the proposition that such ordinances are *ultra vires* and unconstitutional where they are applied to an individual trailer used as a dwelling upon a lot owned or leased by the owner of a trailer. Thus they argue, "how can it be within police power to regulate the mere parking or storage of a trailer *not* used as a dwelling? It follow that this also is *ultra vires.*" The answer is twofold.

First: The allegedly supportive cases are factually distinguishable and they are legally not applicable as they dealt with the licensing power of municipalities under N.J.S.A. 40:52-1(d). In *Devine* the court noted expressly "We are deciding this matter only on the question of the right of the municipality to license and not on its right to regulate in such cases." 28 N. J. Super. at p. 305. We have also examined the Pennsylvania decisions to which we were cited by defendants, and we find them not pertinent as they involved different legislative material.

Appendix B

SECOND: The Livingston Ordinance was enacted pursuant to the broad and comprehensive provisions of R.S. 40:48-2 (source L. 1917, c. 152, sec. 2, p. 357) which permit a municipality to adopt ordinances for the protection of persons and property and for the preservation of the public health, safety and welafe of a municipality and its inhabitants. Liberal construction thereof is made mandatory by our Constitution of 1947 (Art. IV, Sec. VII, par. 11), and there attaches to such an ordinance a presumption of validity not to be overcome unless the evidence clearly establishes its unreasonableness. *Vickers* v. *Tp. Com. of Gloucester Tp.*, 37 N. J. 232, 242 (1962). The judiciary does not pass upon the wisdom of a municipal ordinance nor does it nullify decisions of a governing body on the subject of local welfare merely because a debatable issue is presented. *Ibid.* Note also *Schmidt* v. *Board of Adjustment, Newark*, 9 N. J. 405, 416 (1952); Cunningham, "Control of Land Use in New Jersey by Means of Zoning," 14 *Rutgers L. Rev.* 37, 47-48 (1959). It is apparent that the statutory grant of police powers to municipalities encompasses the authority to enact regulatory ordinances for the protection and preservation of property values affecting the general welfare of the community. See *Fred* v. *Mayor and Council, Old Tappan Borough*, 10 N. J. 515, 521 (1952).

Moreover, current authorities recognize neighborhood aesthetics to be integrally bound to property values and to be relevant considerations in zoning when they bear in a substantial way upon land utilization. *United Advertising Corp.* v. *Borough of Metuchen*, 42 N. J. 1, 6 (1964); *Vickers* v. *Tp. Com. of Gloucester Tp., supra*, 37 N. J. at pp. 247-248; *N. Y. Central R. R.* v. *Borough of Ridgefield*, 84 N. J. Super. 85, 93 (App. Div. 1964). *Vide* "Zoning Aesthetics, and the First Amendment," 64 Colum. L. Rev.

81 (1964); Agnor, "Beauty Begins a Comeback: Aesthetic Considerations in Zoning," 11 J. Pub. L. 260 (1962). Municipal zoning legislation is one branch of the State's broad regulatory police power. *Schmidt* v. *Board of Adjustment, Newark, supra,* 9 N. J., at p. 414. Thus, if an objectionable use, such as here involved, may be prohibited under the zoning statute, *a fortiori,* it may be barred by the municipality under the statute vesting it with general regulatory police power. See R. S. 40:48-2; *Napierkowski* v. *Gloucester Tp.,* 29 N. J. 481, 496 (1959); *Fred* v. *Mayor and Council, Old Tappan Borough, supra,* 10 N. J., at pp. 520-521.

Defendants in their brief pose an example as to how the ordinance in the instant case might be unconstitutionally applied to one, such as a transient traveler, who temporarily parks a trailer within the township. We are not here concerned with such a situation. The accused continued the outdoor storage of their vehicle in violation of a municipal regulation with which they were in a position to comply by simply storing the camp trailer in their garage. "An ordinance that may operate reasonably in some circumstances and unreasonably under others, is not void *in toto,* but is enforceable except where in the particular circumstances its operation would be unreasonable and oppressive." *Vine* v. *Board of Adjustment of Ridgewood,* 136 N. J. L. 416, 418 (Sup. Ct. 1947). See also 2 *Sutherland Statutory Construction* (3d ed. Horack, 1943), sec. 4509, p. 326.

The ordinance under review is aimed at preventing unsightly appearances and diminution of property values which attend the outdoor parking or open-air storage of trailers in a residential area of the community. The reasonableness of the prohibitory enactment is evidenced by

the provision which permits the storing of trailers "within a building." Defendants were not deprived of a right to own a trailer or to store it on their premises; they were only restricted from indulging in a use that would impinge upon the rights of other property owners. The township Ordinance No. 46 is the product of a valid exercise of municipal power and as applied to defendants is not unconstitutional.

As to the Zoning Ordinance. The "R-4" Residence District was designed for one-family dwellings and the accessorial uses were broadly defined as those "customarily incident to such single family residential use * * *." We here emphasize that the question involved as to this phase of the case is whether the open-air parking or storage of a trailer is a permitted accessorial residential use under the Livingston zoning ordinance. No question is presented as to whether the keeping of a trailer in a closed garage (except when in actual use) would constitute such accessorial residential use.

It is not disputed that the allowance of a primary use generally authorizes all uses normally accessory, auxiliary or incidental thereto. *Zahn* v. *Newark Board of Adjustment*, 45 N. J. Super. 516, 521-522 (App. Div. 1957); *Borough of Northvale* v. *Blundo*, 85 N. J. Super. 56, 59-60 (App. Div. 1964); 1 *Rathkopf, Law of Zoning and Planning* (3d ed. 1960), pp. 23-4, 5.

It was emphasized, however in *Skinner* v. *Zoning Bd. of Adjust. Cherry Hill Tp.*, 80 N. J. Super. 380 (App. Div. 1963), that accessory uses are not without their limitations. In that controversy, although the erection of a radio tower and antenna on premises in a residence zone for use by an amateur as a hobby was held to have been an accessory use

"customarily incidental" to the enjoyment of his residential property, the opinion of the court concluded with the admonition "that plaintiff [the hobbyist] must comply with the setback provisions of the zoning ordinance and the local building code * * *." *Id.* at p. 392.

Defendants maintain that the parking of a camp trailer adjacent to their home involved a permissible right incident to a family hobby or recreational activity and therefore it was a valid accessory use. In their brief it is argued that the holding in *Borough of Chatham* v. *Donaldson*, 69 N. J. Super. 277 (App. Div. 1961), is "precisely in point." Donaldson, in that case, was convicted of parking four automobiles in the driveway of a residential property in contravention of the borough's zoning ordinance. This court, in reversing the conviction pointed out that an accessory use has been defined as one "customarily incident to the principal use and so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it." 69 N. J. Super., at p. 282. We then observed that the maintenance of a family home includes uses for private religious, educational, cultural and recreational activities. Also, that the pursuant of a hobby is customarily a part of recreational activity. But we cautioned:

> "As long as the pursuit thereof is not of such a nature, or to such an extent, as to impair the residential character of the neighborhood, it cannot be supposed a zoning ordinance was intended to prevent it." *Ibid.*

The Chatham ordinance provided for private garages, in residential districts, large enough to accommodate three cars. The parking of one or two extra automobiles did not impair the residential character of the district in which

Donaldson lived. That case is factually inapposite to the matter at bar. There is an obvious and vast distinction, in terms of vehicular parking in a residential community, between the commonplace automobile and a camp trailer.

Recently, in the *Borough of Northvale* v. *Blundo* case, *supra,* this court had the occasion to again consider the subject of "accessory uses." We affirmed the conviction of defendant Blundo for the violation of a local zoning ordinance in that he parked a commercial vehicle at night in the driveway of his residential home instead of in a garage, saying:

> "It is not such a use as one could reasonably say was customarily incidental to the residential use, nor one so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it." 85 N. J. Super., at p. 60.

Blundo overruled the conclusion reached in the earlier case of *Borough of Mountain Lakes* v. *Mola,* 60 N. J. Super. 419 (Cty. Ct. 1960), wherein the parking of a red and green one-half ton pickup truck in the driveway of defendant's residence was held to be an accessory use.

The record here clearly demonstrates that defendants used their camp trailer on trips *away from* Livingston and that, while at home, it was not parked or stored within a building as permitted but, rather, was parked or stored in a manner intended to be prevented by the local ordinances. Such was not an "accessory use."

There was a violation of each of the two ordinances as charged, and the evidence sustains the convictions.

Affirmed.

APPENDIX C

Oral Opinion and Findings (Essex County Court)

The Court: No, I am prepared to decide this now.

Gentlemen, I have examined the ordinances involved and the transcript of the trial before the magistrate, Magistrate Kent. I have read the briefs and considered the cases. I am prepared to decide this matter orally.

This is an appeal from a conviction in the Livingston Municipal Court of the two defendants. There were two charges against them, two complaints. In the one complaint they were charged with a violation of the zoning ordinance, and more particularly that portion of the ordinance which dealt with accessory use of property.

By the way, gentlemen, if I err in any factual statement please feel free to interrupt me.

They were also both charged with violation of (31) Ordinance #46 which deals with the parking or placing of trailers.

The defendants are husband and wife, residents of 69 Belmont Avenue, Livingston.

Mr. Yacavino: 96, if your Honor please.

The Court: 96 Belmont Avenue, Livingston. They were found guilty by the magistrate and each were fined five dollars on each charge. No costs were assessed.

This is a trial de novo on the record. It would suffice to say insofar as my disposition of this case is concerned, I am fully in accord with the thorough opinion written by Judge Kent. I adopt as my own the conclusions of law which he reached. I find that the municipality has as to each defendant and as to each of the two charges established its case beyond a reasonable doubt. Thus, I find each defendant guilty of each charge.

Appendix C

Merely by way of supplement to Judge Kent's opinion, I will discuss some of the points raised, but my discussion of them will be relatively brief. First as to the charge of violation of those sections of the ordinance which deal with accessory use, we find admittedly that the premises owned and occupied by the defendants is within an R-4 resident district. (32) To consider what is permitted in such a district we go back to section #901 of the Zoning Ordinance and we find that there is to be permitted among other things; "Accessory use customarily incident to such single family residential use." In Section #302 an accessory use is defined as follows: "A use naturally and normally incident and subordinate to the main use of the premises or lot."

The township at the trial produced proof which is undisputed that a trailer, "a small house trailer" was during the periods in question parked on the side lawn of the defendant's home. The trailer is described as about seven feet long and six feet wide, and something in the area of about six feet high. The trailer was on wheels and it stood adjacent to the house in the side lot. The pictures of the trailer indicate beyond doubt that it was what it was described as, namely a house trailer and it is quite apparent from the pictures and from the description given by the township witness that it had sleeping accommodations usual to such a trailer. There is expert testimony by the township that such parking of a trailer is not the commonly accepted accessory use of a dwelling such as the one in question. I do not know whether this is a subject of expert opinion or not. Whether (33) it is or not, I am satisfied that independently of that expert testimony this parking of a house trailer is not a proper accessory use under the ordinance.

Appendix C

Mr. Benz: Your Honor, is it a house trailer or travel trailer, I don't know.

The Court: I realize and I understand your point, Mr. Benz. I realize that the defendant contends that this is a travel trailer here. I accept the fact that it is a travel trailer, also it is a house trailer, to my mind, under the description of it as given by the township's witnesses. I realize there is a distinction between a mobile home, which is a larger type of trailer, much larger. It is one which probably has to have a tractor to convey it. But as between a trailer home and a house trailer, I see no substantial distinction.

I realize that in Wright v. Vogt, 7 N. J. 1 (1959), a 60 foot tower or support for an amateur's radio antenna was held to be a permissible accessory use and the point is discussed in Chatham v. Donaldson, 69 N. J. Super. 277 (App. Div. 1961). In that case the parking of four automobiles in a driveway of a residential property was held not to impair the residential character of the district. The test was given on page 282 of the decision where the court (34) said, "An accessory use has been defined as one customarily incident to the principal use and so necessary or commonly to be expected that it cannot be supposed that the Ordinance was intended to prevent it."

I do not think that the parking of trailers or house trailers is necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it. I find as a fact that this parking in the open of this type of trailer is not so common as to be permitted as an accessory use.

I am aware that in Skinner v. Zoning Board of Adjustment of the Township of Cherry Hill, 80 N. J. Super. 380, a radio tower antenna was held to be permissible, "accessory use," under a zoning ordinance and that that case

holds that zoning regulations are restrictive of property rights and should not be too broadly interpreted against the possessor thereof. However, I still conclude that the parking of this large trailer in the side yard did not constitute a proper accessory use. Some support is given to this view in Northvale vs. Blundo, 81 N. J. Super. 201 (Bergen County Court 1963), wherein it was held that the parking of a commercial vehicle overnight was not an accessory use to the dwelling function of (35) property. I realize that this trailer was used for weekend recreation of the defendants and their children, but as the pictures demonstrate it was parked at other times in a grassy area. It is the same color as the house. But, I repeat, I just do not think that this type of parking is so common as to make it a proper accessory use.

We come now to the Ordinance #46 which has been in effect in Livingston since 1937. Without reciting the preamble of that ordinance, except to say that it was adopted to protect the health, welfare and safety of the inhabitants, we find that paragraph one of it defines a trailer such as the one here involved and paragraph two states that it shall be unlawful to park any trailer on any street in Livingston or any premises except for the purpose of repair or storage. When parked for repair or storage it is provided that the vehicle shall be kept within a building. Now this trailer was not kept within a building, it was kept in the open. It was not, it is true, slept in at any time and so I find.

I am satisfied that this ordinance is a perfectly valid regulation of the police power.

In Napierkowski v. Gloucester Township, 29 N. J. 481 (36) (1959), an ordinance regulating the isolated storage of trailers on individual lots in residential districts was

upheld. The court said that such an ordinance was not an arbitrary and unreasonable exercise of the zoning power. See page 496 of the decision. There on that page the court said that the municipality may narrow such uses under its general police power R.S. 40:48-2. The case has application here as making valid some regulations against trailers whether they be house trailers, traveling trailers, or mobile homes. In this connection see Fred vs. Mayor and Council, Old Tappan Borough, 10 N. J. 515 (1952). There the statute abovementioned was discussed on page 520 and it was said that it gave an express grant of broad general police powers to municipalities. Any municipality, the Court there held, may take action for good government, order, and protection of persons and property, and for preservation of public health, safety, and general welfare of the municipality and its good inhabitants, subject only to the limitation that such action not be prohibited by or inconsistent with the constitution or other statutes. In that case the ordinance prevented except under certain regulations the removal of (37) top soil and subsoil and it was upheld.

I believe that this ordinance dealing with trailers that is Ordinance #46, is a perfectly valid exercise of the police power. Bear in mind that this ordinance does not prevent the keeping of trailers on the property of an owner. It merely says that they cannot be kept there except within a building.

We have had for years zoning ordinance regulations relative to the erection of garages and in this very ordinance we have such a regulation. What was the section?

Mr. Yacavino: Section #410.

The Court: In section #410 of the township of Livingston zoning ordinance we have a requirement: "No building permit shall hereafter be granted for the erection of a

new dwelling unless provisions have been made for the construction of a garage for not more than three motor vehicles connected by driveway to the adjacent street, road or lane." As far as I know, ordinances of this type providing for erection of garages have not been questioned. This Ordinance #46 is not too different.

Surely the welfare of the municipality is substantially impaired, to my mind, if a great (38) number of homes undertake to store their traveling trailers some place in plain sight of the street. Even as the welfare of the community could be upset by the storing of trucks or commercial vehicles (see Northvale v. Blundo, supra) so the welfare of the municipality would be impaired to my mind by the indiscriminate storage of trailers in the open.

I have read the unreported Pennsylvania decision of a Common Pleas Judge in—

Mr. Benz: In Dr. Henry H. Kling and Viola Kling, Appellants from Board of Adjustment of Township of Shaler, decided by Judge Loncher.

The Court: What year?

Mr. Benz: 1962.

The Court: As Judge Kent said, this decision is not binding on him, nor is it binding on me. I have considered it and it is somewhat in point. I do not believe, however, it should be followed under our decisions. I did have some difficulty in reading the opinion because of the way the pages are set up in the photostatic copy which I have. However, as I understand the opinion, there was a total barring of trailers in the municipality with which Judge Loncher was dealing. That is not so in this case. As I have (39) said, the trailers can be kept in Livingston if they are under cover. In the event, this distinction be not valid, I do not choose to follow Judge Loncher's opinion.

Appendix C

What I have said, as I indicated before, is merely supplementary to Judge Kent's decision which, as I have indicated, I think is dispositive of the matter.

I find both defendants guilty on each charge and I will fine them the same amount that they were fined in Livingston, namely $5 each on each count on each charge. There were no costs assessed in Livingston. I will assess costs in this case of $8.50 against the husband on each charge and not against the wife, so that the total cost assessed will be $17.

Is there anything I have not covered?

Mr. Benz: Only one thing. I was wondering if your Honor wanted to include in your opinion a comment on the constitutionality as far as discrimination is concerned under #46.

The Court: In answer to your specific question, Mr. Benz, I do not find that the Ordinance #46 is in violation of the Constitution.

APPENDIX D

Magistrate's Opinion

Defendants are charged with violation of two separate ordinances of the Township of Livingston, viz: (a) Ordinance No. 46, adopted August 2, 1937, referring to trailers, and (b) Sections 901 and 1201 of the Zoning Ordinance adopted July 20, 1959.

Both Complaints were tried together. The facts are not in substantial dispute. Defendants parked, within the limits of the Township and on their lands located within the confines of an, "R-4" resident district, designed for single residence use, an unoccupied trailer. Said trailer was not kept within a building. Defendants referred to said vehicle as a travel trailer, used by them and their minor children for their own recreational purposes on week end and holiday trips away from their lands. Said trailer was designed and contained living facilities to permit occupancy thereof as a temporary dwelling or sleeping place.

The basic questions for determination are:

1. Whether Ordinance No. 46 is a reasonable exercise of the general police power, R.S. 40:48-2; and

2. Whether Sections 901 and 1201 of the Zoning Ordinance prohibits the Defendants from using their lands for parking, placing or storing their trailer on said premises located within a "R-4" resident district.

As to Question (1), Ordinance No. 46:

The preamble reveals R.S. 40:48-2 as authority for the adoption of said Ordinance. The title thereof and the

definition, "Trailer", under Section 1, and the parking of said trailer, the storing of same and failure to keep it within a building under Section 2, is all inclusive of the evidence developed at the trial.

SECTION 1—A trailer is defined to, "be *any vehicle used or intended for use* as a conveyance upon the public streets * * * and duly licensed, and shall include self-propelled and non-self-propelled vehicles *so designed* * * * *in such a manner as to permit the occupancy thereof as a temporary dwelling or sleeping place* * * *."

SECTION 2—It shall be unlawful for any person to *park any* trailer * * * on *any premises* within the limits of the Township of Livingston except for the purpose of repair or *storage. Any such* trailer * * * *being stored* shall be kept *within a building* (italics by me).

Under the Ordinance it is clearly established that it makes no difference that said trailer was described as a travel trailer or that it was only employed on week end and holiday trips away from said premises for recreational purposes. It was the type of vehicle used or intended for use and designed to permit occupancy thereof as a temporary dwelling or sleeping place, parked on Defendant's premises, stored thereon but not kept within a building.

In adopting said Ordinance, it is obvious that the Township was concerned with the public health and safety of its inhabitants and mindful that such trailers were not conducive to the welfare of the Township and its peoples and would tend to undermine the use of land and conservation of property values. In these regards the Ordinance is not unreasonable, arbitrary or inappropriate.

Fred v. Mayor and Council of Boro. of Old Tappan, 17 N. J. Super. 153, Law Division (1951) at page 157 (affirmed 10 N. J. 515 (1952)).

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* * * "The Ordinance in question has as its objective the promotion of the general welfare, i.e. the preservation of the value of real estate, and the taxable wealth of the municipality. It seeks to protect a basic interest of society. The means employed to accomplish this result are not unreasonable, arbitrary or inappropriate".

Fred v. Mayor and Council, Old Tappan Borough, 10 N. J. (1952), supra, at page 520:

"This interpretation of R.S. 40:48-2 as an express grant of general powers to municipalities has been made impregnable by the continued legislative acquiescence therein, by the mandate of Article IV, Section VII, paragraph 11 of the Constitution of 1947 that acts concerning municipalities be liberally construed, and by the adherence thereto of the more recent judicial decisions".

Also other cases therein cited:

Auto-Rite Supply Co. v. Mayor, etc. Woodbridge Tp., 41 N. J. Super. 303 (Law Div.) (1956) at page 309 (affirmed 25 N. J. 188 (1957));

"There is of course, a presumption in favor of the validity of an Ordinance, and the burden of showing to the contrary rests upon those who attack it".

Also other cases cited:

Gilman v. Newark, 73 N. J. Super. 562 (Law Div.) (1962) is authority in deciding Legislative Judgment, page 578;

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"Even if its validity is fairly debatable, the Legislative Judgment should be allowed to control." Clary v. Borough of Eatontown, 41 N. J. Super. 47, 69 (App. Div. 1956)—Katobimar Realty Co. v. Webster, 20 N. J. 114, 124 (1955).

Auto-Rite, supra at page 309:

"The police power is an attribute of sovereignty and is inherent in every sovereign government. Reingold v. Harper, 6 N. J. 182, at page 194 (1951); 11 Am. Jur., 966-967. It comprehends measures essential to the preservation of the public health, safety and common welfare".

Also other cases cited:

Fred v. Mayor and Council of Boro. of Old Tappan, supra at page 158;

"Plaintiffs rights are not affected any more seriously than are thousands of others where rights of property are limited by the Zoning laws. General public welfare is superior in importance to pecuniary profits of the individual, and the right of private property must yield to the common good." Earrusso v. Board of Health, East Hanover Twp., 120 N. J. L. 463 (Sup. Ct. 1938).

Collins v. Board of Adjustment of Margate City, 3 N. J. 200 (1949) at page 206:

"* * * All property is held in subordination to the police power; and the correlative restrictions upon individual rights—either of person or of property—are incidents of the social order, deemed a

negligible loss compared with the resultant advantages to the community as a whole, if not, indeed, fully recompensed by the common benefits."

Also followed in Lake Intervale Homes, Inc. v. Parsippany Troy Hills, 28 N. J. at page 437.

To like effect, Gilman v. Newark, 73 N. J. Super. 562 (Law Div. 1962) at pages 599 and 600.

The Court has weighed and reviewed the reasoning and law submitted on behalf of the Defendants all of which appears to agree with this Court's analysis or are not applicable. Defendants are found guilty of the charge made in the Complaint.

As To Question (2); Zoning Ordinance

The right of Defendants, if any, to park their trailer in an "R-4" Resident District arises from Article 12, Sections 1201 and 901 of the Township Zoning Ordinance adopted July 20, 1959. The applicable provisions are: Section 901—"Accessory uses customarily incident to such family residential use", also Article 3, Definitions, Section 302—"Accessory Use. A use naturally and normally incident and subordinate to the main use of the premises or lot."

Great emphasis has been placed in support of Defendant's position on the cases of "Chatham v. Donaldson, 69 N. J. Super. 277 (App. Div. 1961)" and others cited by them. Mainly these cases have to do with accessory uses other than trailers or are not applicable or have been dealt with under the previous heading (Question 1) supra.

The case of Napierkowski v. Gloucester Tp., 29 N. J. 481 (1959), involved the use of a trailer as a residence and is not similar to the instant case.

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Chatham v. Donaldson, supra at page 282 had this to say:

> "An accessory use has been defined as one customarily incident to the principal use and so necessary or commonly to be expected that it cannot be supposed that the Ordinance was intended to prevent it." Mountain Lakes v. Mola, 60 N. J. Super. 419 (County Court, 1960); Wright v. Vogt, 7 N. J. 1 (1951).

These are also the cases urged by Defendants in support of their contentions.

It appears that the best and direct clues to determine what was intended by the Township in the Adoption of the provisions pertaining to Accessory Uses, Sections 1201 and 901, supra, can be found by perusing other provisions of said Ordinance; and other related Ordinances of said Township and appropriate Statutes.

Section 410. Prescribes for construction of garage for not more than 3 motor vehicles and not more than 1¾ ton commercial vehicle which must be regularly garaged. Ordinance #46, supra, had been enacted at the time of the Adoption of the Zoning Ordinance containing said Sections 1201 and 901, supra.

R.S. 39:1-1, defines "Trailer",—means every vehicle with or without motive power * * *—"Vehicle"—means every device in, upon or which a person or property is or may be transported upon a highway * * *.

Providing for the garaging of a Commercial vehicle, and for 3 motor vehicles certainly indicated an intention to limit the type and use of permitted vehicles. This is coupled with Ordinance #46 prohibiting the parking of any trailer on any premises within the limits of the Township

and requiring same when stored to be kept within a building. Reading these Ordinances and especially the pertinent provisions and R.S. 39:1-1, supra, in pari-materia, leaves no doubt as to the clear intention to prohibit the use of said trailer by parking, storing or placing it on Defendants' open premises.

The Attorneys for Defendants put great stress in their brief on an annexed Pennsylvania Court opinion, "In the County Court of Alleghany County, in appeal of Dr. Henry H. Kling, etc., decided by Loucher, P. J. 1962". This Court is, of course, not bound by this decision. Without passing on the legal merits thereof, the facts and circumstances and the Ordinances involved are not entirely analogous to the case sub judice.

As examples: (a) Outside assistance for definition of trailer was relied upon by the Court by exploring its use and application in the trade generally and from literature on the subject. In the present case, Trailer, under Ordinance #46 is definitely defined and its design, construction, use and intended use spelled out; (b) said court considered a Zoning Ordinance (364) which permitted in a single-family district an accessory use which included under Section 11(b) a private garage * * *", the instant case, Zoning Ordinance Section 410—limits the number of permitted vehicles and describing how same shall be regularly garaged.

The Zoning Ordinance (Sections #302, #901 and #1201) permits and defines, "Accessory uses customarily and incident * * *", "a use subordinate to the main use of the premises or lot".

In deciding the application of Accessory uses, our Courts have decided that the parking of one or two extra

automobiles cannot be construed as an extension of a hobby or habit to such a degree as to impair the residential character of the resident district. (See Chatham v. Donaldson, supra, at page 282). However in the instant case, a trailer, as defined, in the Ordinance #46 is involved and not an automobile.

The trailer in question does not fit into the meaning enunciated in Chatham, etc., supra, at page 282, to wit: "Pursuit of a hobby is clearly customarily a part of recreational activities". This reasoning was there being applied to passenger automobiles. That it was never intended to be applied to this trailer is evidenced by reading further on said page 282: "As long as the pursuit thereof is not of such a nature, or to such an extent, as to impair the residential character of the neighborhood, it cannot be supposed a Zoning Ordinance was intended to prevent it". As discussed, heretofore, said trailer, parked, placed and stored on Defendant's premises definitely impairs the residential character of the neighborhood.

The testimony, including the 2 photographs of said trailer, both marked in evidence, plainly shows that the construction, design, use and intended use of said trailer, parked, placed or stored openly on Defendant's lands impairs the residential character of the neighborhood. It does not embrace the permitted intended uses as heretofore discussed or defined. This conclusion is further fortified by the Court's authority to employ common sense and Judicial and personal knowledge in determining the customary and ordinary accessory uses intended under the given circumstances. City of Knoxville v. Brown, 260 S. W. 2d 264; 195 Tenn. 501:

> "In determining what a one-family dwelling may necessarily be used for as required in construing

city zoning ordinance prohibiting use of property in certain neighborhood except for one-family dwellings and things which customarily and ordinarily go with such dwellings, Justices must use their common sense and Judicial and personal knowledge of what such dwellings are customarily and ordinarily used for or what ordinary man would consider a one-family dwelling to be."

Defendants are found guilty of the Zoning charge. Sentence of both findings to be had on Wednesday, January 8, 1964 at 8 o'clock P.M.

FRANK I. A. KENT,
Magistrate.

Dated: December 20, 1963.

APPENDIX E

Zoning Ordinance

ARTICLE 9.

"R-1" RESIDENCE DISTRICT

901. PRIMARY INTENDED USE. The "R-1" Residence District is designed for single family residential use, but in addition thereto, the following structures and uses shall be permitted:

(a) Accessory uses customarily incident to such single family residential use, provided they do not include any activity commonly conducted for gain unless specifically permitted in this Article.

• • •

ARTICLE 12.

"R-4" RESIDENCE DISTRICT

1201. PRIMARY INTENDED USE. The "R-4" Residence District is designed for single family residential use, but in addition thereto, the structures and uses mentioned and regulated in Section 901 shall also be permitted.

1202. PROHIBITED USE. Any use other than those listed in Section 901 is prohibited.

• • •

APPENDIX F

Ordinance No. 46

AN ORDINANCE DEFINING TRAILERS OR CAMP CARS AND PROHIBITING THE PARKING OR PLACING OF THE SAME WITHIN THE LIMITS OF THE TOWNSHIP OF LIVINGSTON.

Preamble: Reason for Ordinance.

WHEREAS, in order to protect the health, welfare and safety of the inhabitants of the Township of Livingston it is deemed advisable to prohibit the parking or placing of trailers or camp cars, as herein defined, within the limits of the Township of Livingston.

BE IT ORDAINED by the Township Committee of the Township of Livingston, as follows:

Definition Trailer.

1. For the purpose of this ordinance a trailer or camp car is hereby defined to be any vehicle used or intended for use as a conveyance upon the public streets or highways and duly licensed as such; and shall include self-propelled and non-self propelled vehicles so designed, constructed and reconstructed or added to by means of accessories in such a manner as to permit the occupancy thereof as a temporary dwelling or sleeping place for one or more persons and having no foundation other than wheels, jacks or skirtings so arranged as to be integral with or portable by said trailer or camp car.

Appendix F

Parking of Trailers Prohibited.

Exception.

2. It shall be unlawful for any person to park any trailer or camp car on any street in the Township of Livingston or on any premises within the limits of the Township except for the purpose of repair or storage. Any such trailer or camp car undergoing repairs or being stored shall be kept within a building and shall not during such period of repairs or storage be used by person as a dwelling or sleeping place.

Penalty.

3. Any person who shall violate this ordinance or any of its provisions shall upon conviction thereof be subject to a fine not exceeding $200.00 or imprisonment for a term not exceeding ninety days or both.

Effective Immediately.

4. This ordinance shall take effect immediately.

Adopted August 2, 1937.

JOSEPH JAMES SPURR, 2nd
Chairman Twp. Com.

CHARLES G. ZAHN
Township Clerk.

END